UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOSHAW THERMAL TECHNOLOGY, LLC

and Case 05-CA-158650

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL UNION NO. 23

Andrew Andela, ESQ.,
for the General Counsel.
Thomas R. Davies, ESQ., of Lancaster, PA.
for the Respondent.
William McGee of Middletown, PA.
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Eric M. Fine, Administrative Law Judge. This case was tried in Baltimore, Maryland on April 25, 2016. The International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 23 (the Union) filed the charge on August 24, 2015, against Loshaw Thermal Technology, LLC (Respondent).[1] The General Counsel issued the complaint on December 31, 2015, alleging Respondent violated Section 8(a)(5) and (1) of the Act by: (a) since about April 23, refusing to bargain with the Union as the exclusive representative of bargaining unit employees; (b) since June 22, refusing to continue in effect the terms and conditions of the collective bargaining agreement in effect from July 2, 2012 to June 28; and by withdrawing recognition from the Union on about June 22.

On the entire record, including my observation of witness demeanor, and after considering the briefs filed by the General Counsel and Respondent, I make the following:[2]

[1] All dates are 2015 unless otherwise indicated.

[2] In making the findings, I have considered demeanor of the witness, the content of his testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what the witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951).

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company, with a principal place of business in Spring Grove, Pennsylvania (Respondent's facility) has since 2011 been engaged in providing thermal mechanical insulation services. During the 12 month period ending April 25, 2016, Respondent purchased and received at Respondent's facility goods valued in excess of $50,000 from other enterprises located in Pennsylvania, which enterprises had received those goods from outside Pennsylvania. Respondent admits and I find it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At the trial, the parties entered a written stipulation, which reads in part:

5. In 2011, Respondent recognized the International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 23 (the Union) as the exclusive collective bargaining representative of the following unit of its employees ("the Unit"): All mechanics and apprentices and any other individuals performing bargaining unit work who are employed by Respondent, or who are members of the Union, with respect to wages, hours, and other terms and conditions of employment on any or all work which is within the jurisdiction of the Union.
6. The Unit described above in paragraph 5 constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
7. Respondent's recognition of the Union was first embodied in a collective-bargaining agreement that was signed by Respondent and the Union ("the Parties") in 2011, and which expired on June 29, 2012 ("the 2011–2012 collective-bargaining agreement"), a copy of which is attached as Attachment 1. A copy of the Parties' signatures to this collective-bargaining agreement is attached as Attachment 2.
8. Upon the expiration of the collective-bargaining agreement identified above in paragraph 7, Respondent and the Union entered into a successor collective-bargaining agreement, effective from July 2, 2012 to June 28, 2015, that was signed in July 2012 ("the 2012–2015 collective-bargaining agreement"). A copy of the 2012–2015 collective-bargaining agreement is attached as Attachment 3. A copy of the Parties' signatures to the 2012–2015 collective-bargaining agreement is attached as Attachment 4.
9. The parties dispute whether Respondent's recognition of the Union in 2011 and 2012 was pursuant to Section 8(f) of the Act or to Section 9(a) of the Act.
10. Respondent is a closely-held limited liability company. At all material times, Marci Bittner and Wendy Bittner have each owned 50%, and collectively owned 100% of Respondent.
11. At all material times, Marci Bittner has been employed as Respondent's Chief Executive Officer and President and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.
12. At all material times, Wendy Bittner has been employed as Respondent's Chief Operating Officer and Treasurer and has been a supervisor of Respondent within the

meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

13. Logan Bittner has been employed by Respondent from about August 2011 to the present.
14. At all material times, Logan Bittner has been employed as Respondent's Estimator, Foreman, and Sales Manager and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.
15. Shawn Bittner has been employed by Respondent from about April 2011 to the present.
16. At all material times, Shawn Bittner has been employed as Respondent's Superintendent, Foreman, and Project Manager and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.
17. At the time Respondent signed the 2011–2012 collective-bargaining agreement, only Logan Bittner and Shawn Bittner were employed by Respondent to perform work that falls under the descriptions contained in Articles XII and XVII of the 2012–2015 collective-bargaining agreement ("bargaining unit work").
18. Michael Bittner has been employed by Respondent as a mechanic and/or an apprentice from about April 2012 to the present and, during that time, has performed work for Respondent, all of which has constituted bargaining unit work.
19. Joseph DeLozier was employed by Respondent as a mechanic and/or an apprentice from about April 2012 to April 28, 2015 and, during that time, performed work for Respondent, all of which constituted bargaining unit work.
20. At the time Respondent signed the 2012–2015 collective-bargaining agreement, Logan Bittner, Shawn Bittner, Michael Bittner, and Joe DeLozier were all employed by Respondent and were performing bargaining unit work.
21. At various times in 2012 and 2013, Respondent employed Eli Delaware, Levi Feulmer, Torrence Miller, and Jacob Rainey, all of whom exclusively performed bargaining work while employed at Respondent, and none of whom have been employed by Respondent since 2013.
22. Adam Geesey has been employed by Respondent as an apprentice from about September, 2015 to the present as a mechanic and/or an apprentice and, during that time, has performed work for Respondent, all of which has constituted bargaining unit work.
23. At all material times, Wendy Bittner has been the spouse of Logan Bittner.
24. At all material times, Marci Bittner has been the spouse of Shawn Bittner.
25. Adam Geesey is the son of Marci Bittner.
26. Michael Bittner and Joe DeLozier have been employees in the Unit and within the meaning of Section 2(3) of the Act at all times when they were employed by Respondent.
27. On or about February 27, 2015, the Union mailed a letter to Respondent indicating the Union's intent to modify the 2012–2015 collective-bargaining agreement following its June 28 2015 expiration. A copy of that letter is attached as Attachment 5. Respondent admits it received this letter on or about March 1, 2015.
28. On or about April 20, 2015, the Union mailed a letter to Respondent inviting Respondent and the Union's other signatory contractors to a contract negotiations meeting scheduled for May 5, 2015. A copy of that letter is attached as Attachment 6. Respondent admits it received this letter on or about April 22, 2015.
29. On or about April 24, 2015, Respondent mailed a letter to the Union, indicating Respondent's intent to terminate the Parties' bargaining relationship upon the June

28, 2015 expiration of the 2012–2015 collective-bargaining agreement. A copy of that letter is attached as Attachment 7. The Union admits it received this letter on or about April 26, 2015.[3]

30. On or about June 22, 2015, at Respondent's facility, Respondent withdrew recognition of the Union as the exclusive bargaining representative of the Unit. Respondent has at all times since June 22, 2015, continued to withhold recognition of the Union as the exclusive collective bargaining representative of Respondent's employees in the Unit.
31. Since about June 22, 2015, Respondent has repudiated, and has failed and refused to continue in effect all the terms and conditions of, the 2012–2015 collective-bargaining agreement, including by ceasing to make contributions to the health and welfare fund and local pension fund, failing to adhere to hiring and referral procedures, and ceasing to pay its employees in accordance with contractual wage levels.
32. On or about September 28, 2015, Respondent hired Adam Geesey as an apprentice, to perform bargaining unit work. Respondent hired Geesey without providing notice to the Union and without initiating or complying with the hiring hall procedures prescribed in the 2012–2015 collective-bargaining agreement.
33. At no time has Respondent filed a representation petition (RM) with the National Labor Relations Board seeking an election to determine whether a majority of its employees wished to be represented by the Union.
34. At no time has Respondent or the Union been served with a petition seeking an election to determine whether a majority of Respondent's employees wished to be represented by the Union.
35. At no time has Respondent or the Union received any document showing that any of its Unit employees wished to seek an election to determine whether a majority of Respondent's employees wished to be represented by the Union.
36. On September 30, 2015, Respondent submitted a position statement and accompanying documentary exhibits to Region 5 of the National Labor Relations Board, true and correct copies of which are attached as Attachment 8. Attachment 8 omits copies of the Parties' collective-bargaining agreements, already attached as Attachments 1 and 3. Those copies of the Parties' collective-bargaining agreements that accompanied Respondent's September 30, 2015 position statement contained signature pages signed only by the Union, those copies having been made prior to Respondent's execution of the agreements.

The collective-bargaining agreements referenced in paragraphs 7 and 8 of the above stipulation contain the following language in article VII Hiring and Referral and article XVII Recognition:

> Article VII Section 1. (b)
>
> The Union shall be the sole and exclusive source of referral of applicants for employers except in those cases where the Union, having been given the opportunity to refer qualified applicants, is unable to do so within forty-eight (48) hours as hereinafter provided.
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> Article XVII
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> The Union having requested recognition as a Section 9(a) representative of the employees covered by this agreement and having offered to demonstrate or having

[3] The referenced letter sent by Respondent to the Union on April 23, actually states, "we wish to notify you that we intend to terminate the Agreement effective June 28, 2015."

demonstrated through authorization cards that it has the support of the majority of the employees to serve as such representative, the employer hereby recognizes the Union as the Section 9(a) representative of the employees.

Michael Bittner was the only witness called to testify. He was called by Respondent. As reflected by the above stipulation the owners of Respondent, as well as its supervisors are also all named Bittner. The co-owners Marci Bittner and Wendy Bittner are each married to one of Michael Bittner's brothers Logan Bittner and Shawn Bittner, both of whom have been stipulated as statutory supervisors of Respondent. For purposes of clarity, each of the Bittners will be referred to by their full name.

Michael Bittner testified he is employed by Respondent and he has been employed there for about four years. Prior to working for Respondent, Michael Bittner had been a member of the Union. Michael Bittner testified he thought this was in 2001 or 2005. He testified that he left the Union at that point because, "I didn't want to be a part of it." However, Michael Bittner testified that after he left the Union he was no longer doing the same type of work as he became a carpenter. Michael testified when he was in the Union he had been performing insulation work. Michael testified that he did not join the carpenters union when he changed work as he became a private contractor.

Michael Bittner testified when he came to be employed by Respondent he had a conversation with then Union Business Manager Stanton Bair in 2012. Bair retired from the Union in 2013. Michael Bittner testified that he was not a union member at the time of the conversation. He testified Bair was in Respondent's office. Michael Bittner testified Bair said Respondent could hire anyone they wanted, even Michael, "So I got back in." He testified he joined the Union so he could work for his sisters-in-law Marci and Wendy Bittner.

Michael Bittner testified he had conversations with Shawn or Logan Bittner about his feelings about the Union between 2012 and 2015. He testified the conversations regarding the Union were, "I didn't want to be in it anymore." Michael Bittner testified the conversations took place the whole time he was there. Michael Bittner testified that, "About 60 days out from the end of the contract, they asked me if I wanted to stay or go." When asked who asked him that question, Michael Bittner testified, "All the officers, everybody. They asked -- they said do you want to stay in the Union, or do you want to go with us, and I said I want to go with them." Michael Bittner testified this conversation took place in Respondent's office when he showed up for his paycheck. He testified present were Logan, Shawn, Wendy, and Marci Bittner. Michael Bittner testified he went to the office every payday to get his check. He testified that when he goes to get his check usually one of them was present, but this time all of them were there. However, Michael Bittner testified it was not unusual that all four were there because they all could be there at any point. Michael Bittner testified the conversation took place in April or May 2015. He testified when he came to the office they were all at their desks, and no one else was there. When asked who brought up the Union, Michael Bittner testified, "They said they were leaving the Union, and they gave me a choice to stay with them or go with the Union." He testified, "I said I wanted to go with them. That was my choice." Michael Bittner testified they did not all talk at once and he could not recall which one spoke. However, he testified one of the four of them brought this up. Michael Bittner testified that the one who spoke said that they were leaving the Union, "Did I want to stay or go." "Stay with the Union or go non-union." Michael Bittner testified he was told, "it was my choice" and that he had "up to the end of the contract to make that decision." He testified they did not ask him for a decision then but they brought it up, and they told him they were leaving.

Michael Bittner, when asked if when he joined the Union he signed a card and paid dues, testified, "Yes, I paid dues." He testified he resigned from the Union at the end of the contract by signing a paper stating he resigned, and he sent his card back in. Michael Bittner testified right before the end of the contract he told all of Respondent's supervisors that he was going to resign and send his card back. Michael Bittner testified that was when he made up his mind that he was going to do it. Michael Bittner testified he did not type his June resignation letter to the Union. He testified the ladies in the office typed it. Michael Bittner explained his computer was broken so he could not type it. He testified they typed it and he signed it before the end of the collective-bargaining agreement.

B. Analysis

In *MSR Industry Services, LLC,* 363 NLRB No. 1, slip op. at 2 (2015), the following principles were set forth:

> When relationships in the construction industry are governed by Section 9(a), the employer cannot change terms and conditions of employment unilaterally upon contract expiration, and it must continue to recognize and bargain with the union after the contract expires. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). In an 8(f) relationship, by contrast, either party may repudiate the contract and terminate the parties' bargaining relationship when the contract expires. See *John Deklewa & Sons*, 282 NLRB 1375, 1386-1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988).

In *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 412-415 (1960) in 1954 an employer and a union entered into a collective-bargaining agreement containing a recognition clause and a union security clause requiring bargaining unit employees, subject to a specified grace period, to become members of the union. In 1955 a new agreement was signed replacing the old agreement and applying additionally to employees at a newly opened plant as well as to those covered by the original agreement. The Court noted that when the original agreement was signed in 1954, the union did not represent a majority of the employees covered by it. The Court stated of the Board has evolved the principle that it is an unfair labor practice for an employer and union to enter into a collective-bargaining agreement containing a union security clause, if at the time of original execution the union does not represent a majority of the employees in the unit. The Court stated that 10 months after the execution of the later agreement and 12 months after the execution of the original agreement unfair labor practice charges were filed alleging the union's lack of majority status at the time of execution and the consequent illegality of the continued enforcement of the agreement. However, the Court stated citing Section 10(b) of the Act "we hold that the complaints against these petitioners are barred by time." The Court stated:

> Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that s 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' H.R.Rep.No.

245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships. Id at 419.

The Court stated, "Put another way, if the s 10(b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement." Id. At 423. The Court explained:

> We think this analysis inadmissible here, for the reason that the accommodation between these competing factors has already been made by Congress. It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The 'policy of the Act' is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. Cf. note 7, ante. It may be asserted, without fear of contradiction, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in 'industrial peace which it is the overall purpose of the Act to secure.' (Citations omitted.) As expositor of the national interest, Congress, in the judgment that a six-month limitations period did 'not seem unreasonable,' H.R.Rep.No. 245, 80th Cong., 1st Sess., p. 40, barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights. 'It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. Id. 428-429.

In *Casale Industries,* 311 NLRB 951, 952-953 (1993), the Board stated as follows:

> Of course, even where parties intend a 9(a) relationship, that intention will be thwarted if the union does not enjoy majority status at the time of recognition. Clearly, if majority status is challenged within a reasonable time, and majority status is not shown, the relationship will not be a valid 9(a) relationship.[12]
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> In the instant case, there is at least a substantial question as to whether majority status has been shown. In this regard, we note that the employees were not presented with a "no-union" choice. Further, quite apart from this problem, there was no separate tally of the votes of the employees of Casale and Miller.[13] However, the challenge to majority status came 6 years after Section 9 recognition was extended and accepted. The parties reached agreement on three successive contracts during that period. The issue before us is whether to permit a challenge to majority status after 6 years of stability in a multiemployer relationship.
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> We will not permit the challenge. Our conclusion that the petitions should not be processed in single-employer units is based on the proposition that a challenge to majority status must be made within a reasonable period of time after Section 9 recognition is granted. In *Comtel*, the Board's statement of the governing principles included a requirement that the challenge to majority status be made within a reasonable period of time.[14] In the instant case, the Section 9 recognition was extended 6 years before the challenge to majority status. For the reasons that follow, we believe that this 6-year period was more than a reasonable period of time.
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> In nonconstruction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition.[15] A contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined.[16]

These same principles would be applicable in the construction industry. In *Deklewa*,[17] the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries. As shown above, parties in noncontruction industries, who have established and maintained a stable Section 9 relationship, are entitled to protection against a tardy attempt to disrupt their relationship. Parties in the construction industry are entitled to no less protection. Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition.[18]

Because the challenge to majority status in this case was made substantially more than 6 months after the grant of Section 9 recognition, we would not permit the challenge. Accordingly, we would not process these petitions in single-employer units.

In *Re Staunton Fuel & Material, Inc.,* 335 NLRB 717, 718-720 (2001), the Board stated:

> Section 8(f) permits unions and employers in the construction industry to enter into collective-bargaining agreements without the union's having established that it has the support of a majority of the employees in the covered unit.[5] The provision therefore creates an exception to Section 9(a)'s general rule requiring a showing of majority support. Section 8(f) also creates an exception to the general rule of Section 8(a)(2) and Section 8(b)(1)(A) that an employer and a union lacking majority support of unit employees may not enter into a bargaining relationship with respect to those employees.
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> The distinction between a union's representative status under Section 8(f) and under Section 9(a) is significant because an 8(f) relationship may be terminated by either the union or the employer on the expiration of their collective-bargaining agreement. *Deklewa,* supra at 1386-1387. By contrast, a 9(a) relationship (and the employer's associated obligation to bargain) continues after contract expiration, unless and until the union is shown to have lost majority support. *Levitz Furniture Co.,* 333 NLRB 717 (2001). Moreover, an 8(f) contract does not bar a representation petition under Section 9. A contract made with a 9(a) representative does bar such a petition. 29 U.S.C. § 158(f); *Deklewa,* supra at 1387.
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> *Deklewa* also adopted a rebuttable presumption that a bargaining relationship in the construction industry was established under Section 8(f), with the burden of proving that the relationship instead falls under Section 9(a) placed on the party so asserting. *H.Y. Floors & Gameline Painting,* 331 NLRB 304 (2000); *Deklewa,* supra at 1385 fn. 41.[6]
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> However, *Deklewa* did not foreclose an 8(f) representative from achieving 9(a) status. Rather, *Deklewa* emphasized that "nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry." 282 NLRB at 1387 fn. 53. Accordingly, a construction union holding an 8(f) bargaining relationship with an employer could (like a nonconstruction union) achieve 9(a) status either through a Section 9 certification proceeding or "from voluntary recognition accorded … by the employer of a stable work force where that recognition is based on a clear showing of majority support among the union employees, e.g., a valid card majority." Id.
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> We have not, however, clearly defined the minimum requirements for what must be stated in a written recognition agreement or contract clause in order for a union to attain 9(a) status solely on the basis of such an agreement.[9] We believe the approach taken on this issue by the Tenth Circuit in two recent cases issued on the same day, *NLRB v. Triple C Maintenance, Inc.* and *NLRB v. Oklahoma Installation Co.,* establishes a legally

sound and eminently practical set of standards for self-sufficient majority recognition agreements.

In both cases, the court confirmed that written contract language, standing alone, could independently establish 9(a) bargaining status. 219 F.3d at 1155; 219 F.3d at 1164. The court found that to be sufficient, such language must unequivocally show (1) that the union requested recognition as the majority representative of the unit employees; (2) that the employer granted such recognition; and (3) that the employer's recognition was based on the union's showing, or offer to show, substantiation of its majority support. 219 F.3d at 1155-1156; 219 F.3d at 1164-1165.[10]

This approach properly balances Section 9(a)'s emphasis on employee choice with Section 8(f)'s recognition of the practical realities of the construction industry. Such a balance was one of the Board's primary goals in *Deklewa,* 282 NLRB 1375, 1382. The Tenth Circuit's approach also has the advantage of establishing bright-line requirements. Construction unions and employers will be able to establish 9(a) bargaining relationships easily and unmistakably where they seek to do so. These requirements should accordingly reduce the number of cases arising in this area and facilitate the Board's disposition of those disputes that do occur.[11]

We therefore adopt the requirements stated by the Tenth Circuit in *Triple C Maintenance, Inc.* and *Oklahoma Installation Co.*[12] A recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.[13] As the Tenth Circuit discussed in *Triple C*, although it would not be necessary for a contract provision to refer explicitly to Section 9(a) in order to establish that the union has requested and been given 9(a) recognition, such a reference would indicate that the parties intended to establish a majority rather than an 8(f) relationship. 219 F.3d at 1155-1156.[14] To the extent that any of our post-*Deklewa* decisions can be read to conflict with this holding, those decisions are overruled.[15]

To provide further guidance, we offer some additional observations. First, in many cases the union's required request for recognition can be fairly implied from the contract language stating that the employer grants the required recognition. Second, the employer's grant of recognition must be express and unconditional. For example, a recognition provision stating that the employer "will" recognize the union as the majority or 9(a) bargaining representative "if" the union presents evidence that a majority of its employees have authorized the union to represent them in collective bargaining, would not be independently sufficient to establish a 9(a) relationship, due to its conditional nature.[16] Third, with respect to the union's claim of majority support, there is a significant difference between a contractual statement that the union "represents" a majority of unit employees—which would be accurate under either an 8(f) or a 9(a) agreement—and a statement to the effect that, for example, the union "has the support" or "has the authorization" of a majority to represent them. See *NLRB v. Oklahoma Installation,* supra at 1164-1165. Similarly, a provision stating only that a majority of unit employees "are members" of the union would be consistent with a union security obligation under either an 8(f) or a 9(a) relationship and is therefore insufficient to confirm 9(a) status. *James Julian,* 310 NLRB 1247, 1254. To the extent that any of our post-*Deklewa* cases may be read to imply that an agreement indicating that the union "represents a majority" or has a majority of "members" in the unit, without more, is independently sufficient to establish 9(a) status, those cases are overruled.

In *King's Fire Protection, Inc.,* 362 NLRB No. 129, slip op. at 2 (2015), the Board majority relied on the Board's pronouncements in *Re Staunton Fuel & Material, Inc.,* supra, to find that a Section 9(a) bargaining relationship had been established. In *King's Fire Protection,* the Board majority stated:

> Moreover, even assuming that the Union did not actually "present" Smith with evidence of its majority support in 2005, this would not be inconsistent with a finding of 9(a) status under *Staunton*. Neither that assumption, nor any other evidence in the record, negates King's Fire's affirmation in the parties' 2005 agreement that it "freely and unequivocally acknowledges that *it has verified* the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the Act . . . and that the Union *has offered* to provide the Employer with confirmation of its support by a majority of such employees" (emphasis added).[3] King's Fire might have confirmed that majority support through an independent, noncoercive inquiry of its own. At most, Smith's testimony suggests that King's Fire did not avail itself of the Union's offer. His testimony does not establish that the Union lacked majority status. Contrary to our colleague's argument, in making this observation we are not shifting the burden to the Respondent to establish an 8(f) relationship. Rather, we are simply pointing out that Smith's testimony is not fatal to the General Counsel's case based on the parties' 2005 Agreement, which clearly establishes a 9(a) relationship.[4]

In *King's Fire Protection, Inc.,* at fn. 4, the Board majority stated that "Because we do not rely on Section 10(b) in finding that Respondents unlawfully withdrew recognition, we need not address the applicability of *Casale*," referring to *Casale Industries,* supra. The Board majority noted in *King's Fire Protection* at fn. 3, that it was irrelevant that Kings Fire had no employees in 2001 when it first signed Section 9(a) recognition language with the union, because King's Fire signed Section 9(a) recognition language in 2005 when it had employees. In *King's Fire Protection, Inc.,* the Board majority stated as follows at fn. 2:

> Our dissenting colleague also states his disagreement with *Central Illinois Construction* (*Staunton Fuel)*, 335 NLRB 717 (2001), in which the Board held that clear and unequivocal contract language can establish an 9(a) relationship in the construction industry. In our colleague's view, *Staunton Fuel* is in conflict with *Ladies Garment Workers Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961), and was rejected in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). The basis for *Staunton Fuel*'s holding was explained in that decision, and we find it unnecessary to repeat that explanation here. We note, however, that although *Ladies Garment Workers* established that an employer violates Sec. 8(a)(2) if it recognizes a union that in fact lacks majority support as a 9(a) representative, the issue in *Staunton Fuel* was how the Board should *determine* whether a construction employer has agreed to recognize a union under Sec. 8(f) *or* under Sec. 9(a). An employer's failure to review a union's proffered showing of majority support when the parties executed their contract does not indicate that the union in fact lacked such support. In *Nova Plumbing,* as we have previously recognized, the D.C. Circuit held that the Board could not find that a construction bargaining relationship was established under Sec. 9(a) solely on the basis of contract language where there was extrinsic, uncontradicted evidence that the union did *not* have majority support. The court did not hold, as suggested by our dissenting colleague, that contract language can never be held to establish a 9(a) relationship. Rather, the D.C. Circuit has, subsequent to *Nova Plumbing*, effectively rejected our colleague's reading of that case. In *Allied Mechanical Services v. NLRB*, 668 F.3d 758, 768-769 (D.C. Cir. 2012), the court rejected as dicta and as an "overreading of *Nova*

Plumbing" a statement in *M&M Backhoe Service*, 469 F.3d 1047, 1050 (D.C. Cir. 2006) that "[w]e held in *Nova Plumbing* that an offer of proof could not substitute for actual proof." The court clarified that "[t]he precise holding of *Nova Plumbing* is that an employer and union in the construction industry are not free to 'convert' an 8(f) relationship into a 9(a) bargaining relationship "that lacks support of a majority of employees."' 668 F.3d at 769. See also, *Raymond Interior Systems,* 357 NLRB No. 193, slip op. 1 fn. 3 (2011); *M&M Backhoe Service,* 345 NLRB 462 (2005), enfd. 469 F.3d 1047 (D.C. Cir. 2006). We note that in *Ladies Garment Workers Union,* supra, there was no dispute that the union lacked majority support at the time of recognition. Here, however, as discussed below, there is no evidence that the Union lacked majority status when the parties signed the assent and interim agreement in 2005.

In the instant case, the parties stipulated Respondent entered into a CBA with the Union in 2011, containing Section 9(a) recognition language. The precise date the parties signed off on this agreement is unclear from the record. However, the record is clear that Logan Bittner and Shawn Bittner, admitted supervisors and spouses of Respondent's owners, were the only individuals employed performing bargaining unit work at the time Respondent entered its initial CBA with the Union in 2011. Whether or not the initial signing of the Section 9(a) recognition language could be construed to support a Section 9(a) relationship in 2011, the record reveals that Respondent signed the same contract language with the Union in July 2012. At that time, in addition to Shawn and Logan Bittner performing bargaining unit work, Respondent had Michael Bittner and Joe DeLozier on its payroll performing bargaining unit work, and there is no contention that either of those two individuals were statutory supervisors. The Section 9(a) language Respondent signed in July 2012 states, "The Union having requested recognition as a Section 9(a) representative of the employees covered by this agreement and having offered to demonstrate or having demonstrated through authorization cards that it has the support of the majority of the employees to serve as such representatives, the employer hereby recognizes the Union as the Section 9(a) representative of the employees." Thus, the circumstances here are similar to *King's Fire Protection, Inc.,* where the Board determined a Section 9(a) relationship had been established. Moreover, Michael Bittner testified he joined the Union at the time he began working for Respondent in 2012 so he could obtain employment there. Michael Bittner's testimony reveals he in fact signed a union card, as he testified he returned that card to the Union in 2015. Similarly, since both CBA's to which Respondent entered into with the Union had an exclusive hiring hall provision for referrals by the Union, as well as a union security provision, it was likely Respondent's officials suspected DeLozier of being a union member and supporter. Thus, as in *King's Fire Protection, Inc.,* there is no evidence that the Union lacked majority status when the parties signed 2012 CBA containing Section 9(a) recognition language, and I find that a Section 9(a) bargaining relationship was established at the time Respondent entered into the 2012 agreement.

As set forth above, the Board majority in *King's Fire Protection, Inc.,* elected to reach the conclusion that the union there had reached Section 9(a) status without addressing the Section 10(b) issue. However, the Court in *Bryan Mfg.,* specifically weighing the competing interests opposing minority representation versus industrial stability concluded Section 10(b) bars the challenging of alleged minority recognition of a union after six months from the time that recognition is granted. In *Casale Industries,* 311 NLRB 951, 952-953 (1993), the Board stated, "These same principles would be applicable in the construction industry. In *Deklewa*,[17] the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries." The Board in *Casale* stated, "Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of

recognition." Similarly, in *Re Staunton Fuel & Material, Inc.,* 335 NLRB 717, 718-720 (2001), the Board stated, "*Deklewa* did not foreclose an 8(f) representative from achieving 9(a) status. Rather, *Deklewa* emphasized that "nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry." These principles enumerated by the Board and the Court in *Bryan Mfg.* suggest that Respondent entered into a Section 9(a) relationship with the Union when it signed the initial contract, and that this relationship could not be challenged 6 months after it was entered into. In fact, in *Staunton Fuel*, at 720, fn. 14 the Board found where the recognition language is couched in terms of a union's offer to show majority support, an employer can challenge it by showing the required showing was not made, but such challenge must be within 6 months after the written recognition was given as required by Section 10(b) of the Act.[4]

In the present case, Michael Bittner was employed by Respondent at the time of his testimony, his sister in laws owned Respondents, and his two brothers were his supervisors. Prior to working for Respondent, Michael Bittner had at one time been a member of the Union, but his memory was hazy at best here stating he thought his membership was in 2001 or 2005. He testified he left the Union because he did not want to be a part of it, but he also admitted he switched careers at the time he left as he became a carpenter. Michael Bittner testified he joined the Union again in 2012, so he could work for Respondent.

Michael Bittner testified he had conversations with his supervisor brothers Shawn and Logan Bittner between 2012 and 2015. He testified the conversations regarding the Union were, "I didn't want to be in it anymore." Michael Bittner testified the conversations took place

[4] The dissent in the Board's *King's Fire Protection* decision takes issue with the Board's holding in *Casale Industries,* 311 NLRB 951 (1993). However, to my knowledge the principles in *Casale* have not been reversed by the Board, and I am constrained to follow Board law. The dissent in *King's Fire Protection* argues that Section 10(b) only applies to an unfair labor practice, and that it is not an unfair labor practice to accord voluntary recognition under Section 8(f) of the Act. However, it would be a violation if timely raised to accord Section 9(a) recognition the contract language here portends to do here to a minority union. Thus, that language and the recognition it grants could be challenged by the filing of a charge, the same as in non-construction industry scenarios. It is also contended by the dissent that construction industry rival unions and employees would be likely to presume a Section 8(f) relationship has been created and therefore be unlikely to challenge such a relationship within the Section 10(b) period for filing a charge. Of course, these concerns would not apply here because the challenge to the Section 9(a) relationship is not coming from an employee or rival union, but rather Respondent, the party who signed the contracts, several years after they were signed. There is something to be said about holding a party to what they agreed to given the principles enunciated by the Court in *Bryan Mfg*. As to a concern from a rival union knowing to file a charge, the Board issued its *Staunton Fuel* decision in 2001 which by this time should give unions in the construction industry knowledge of a potential 9(a) relationship. Moreover, unions that enter the scene after the six month Section 10(b) period are in no worse position than unions in a non-construction industry. Finally, for any employee who files a potentially belated challenge to a Section 9(a) recognition agreement because of the mistaken belief that it was a Section 8(f) contract, Section 10(b) begins to run when the charging party was aware or should have been aware of the violation. See, *Dutchess Overhead Doors,* 337 NLRB 162, 167 (2001). These are policy matters to be weighed by the Board. However, under current Board law I find Respondent's dispute of the Union's Section 9(a) status is also time-barred by Section 10(b) of the Act.

the whole time he was there. I do not place much credence in this testimony, which lacked specificity as to frequency and the timing of when these purported conversations occurred. I also take note that Michael Bittner, a current employee of Respondent, was called as a witness by Respondent's counsel, to testify on behalf of a company owned and operated by close family members. Thus, he was under pressure to support Respondent's claims. Finally, until Respondent's officials specifically questioned Michael Bittner about it towards the end of the contract, Michael Bittner never sought to withdraw his membership from the Union, that is becoming a core member rather than a full member.

On or about February 27, 2015, the Union mailed a letter to Respondent indicating the Union's intent to modify the 2012–2015 collective-bargaining agreement following its June 28 2015 expiration. On or about April 20, the Union mailed a letter to Respondent inviting Respondent and the Union's other signatory contractors to a contract negotiation meeting scheduled for May 5, 2015. On or about April 24, 2015, Respondent mailed a letter to the Union, indicating Respondent's intent to terminate the Parties' CBA effective on the June 28, 2015 expiration of CBA. The parties stipulated that on or about June 22 Respondent withdrew recognition of the Union as the exclusive bargaining representative of the Unit.

Michael Bittner testified that, "About 60 days out from the end of the contract, they asked me if I wanted to stay or go." When asked who asked him that question, Michael Bittner testified, "All the officers, everybody. They asked -- they said do you want to stay in the Union, or do you want to go with us, and I said I want to go with them." Michael Bittner testified this conversation took place in Respondent's office when he showed up for his paycheck. He testified present were Logan, Shawn, Wendy, and Marci Bittner. Michael Bittner testified he went to the office every payday to get his check. He testified that when he goes to get his check usually one of them was present, but this time all of them were there. However, Michael Bittner testified it was not unusual that all four were there because they all could be there at any point. Michael Bittner testified the conversation took place in April or May and when he came to the office they were all at their desks. When asked who brought up the Union, Michael Bittner testified, "They said they were leaving the Union, and they gave me a choice to stay with them or go with the Union." He testified, "I said I wanted to go with them. That was my choice." Michael Bittner did not recall who did the talking for Respondent, but stated it was one of the four named individuals. Michael Bittner testified the one who spoke said that they were leaving the Union, "Did I want to say or go." "Stay with the Union or go non-union." Michael Bittner testified he was told, "it was my choice" and that he had "up to the end of the contract to make that decision." He testified that they did not ask him for a decision then but they brought it up, and they told him they were leaving. However, as set forth above, Michael Bitter at first testified, "I told them I wanted to go with them."

Michael Bittner testified he resigned from the Union at the end of the contract. He testified he did this by signing a paper that he resigned and he sent his card back. Michael Bittner testified he told all of Respondent's supervisors that he was going to resign and send his card back in. He testified this took place right before the end of the contract, and that was when he made up his mind that he was going to do it. Michael Bittner testified he did not type his June resignation letter to the Union. He testified the ladies in the office typed it. He testified his computer was broken. He testified they typed it, he signed it, and this took place before the end of the CBA.

I find the circumstances, in which Respondent's officials questioned Michael Bittner in April or May 2015, to be coercive and violative of Section 8(a)(1) of the Act. I do not place much credence in Michael Bittner's vague testimony that he had told his brother's throughout his

employment that he did not want to be in the Union anymore. Even if he had made such comments, he never took any action to resign from the Union. Yet, according to his testimony when he went to get his pay check somewhere around 60 days before the end of his contract, Logan, Shawn, Wendy, and Marci Bittner were in the office at their desks. I do not credit his claim that this was not an unusual occurrence, in that he testified usually only one was there when he went to pick up his check. He also testified this was pay day, enabling all the Bittners to plan their attendance at this meeting. Moreover, the conversation to which Michael Bittner testified further evidences a plan. In this regard, Michael Bittner testified when he came to the office they were all at their desks. When asked who brought up the Union, Michael Bittner testified, "They said they were leaving the Union, and they gave me a choice to stay with them or go with the Union." Michael Bittner testified one spoke on behalf of all four. The only way one could have spoken on behalf of all four, was if they had discussed the matter in advance, and planned to confront Michael Bittner about it when he picked up his check. Moreover, while they purportedly gave Michael Bittner a choice in the matter they also told him they were leaving the Union. Since they were not members of the Union, but rather contracting parties with the Union, Michael Bittner was interrogated about whether he wanted to remain a union member, and also told that his doing so would be futile because Respondent was terminating its relationship with the Union. Respondent's officials gave Michael Bittner a deadline for withdrawing from the Union telling him that he had until the end of the contract to make up his mind. In fact, Michael Bittner testified he did not make up his mind until the end of the contract which was Respondent's imposed deadline. At which point, he just happened to be in the office, and Respondent typed his letter of resignation for him. Thus, Respondent initiated his decision to withdraw from the Union, told him it would be futile if he did not as Respondent was leaving the Union, told him that he would be going against the wishes of all of Respondent's officials if he did not withdraw, gave him a deadline to make up his mind coinciding with Respondent's desire to extricate itself from the Union at the end of the contract, and then typed up Michael Bittner's resignation letter for him facilitating the resignation. While this conduct was not set forth in the complaint, I find it was fully litigated as it was raised by Respondent as its defense. I find by its actions, that Respondent coercively interrogated Michael Bittner concerning his union status, told him his continued membership would be an act of futility, gave him a deadline to determine whether he was going to resign, and then facilitated that resignation in violation of Section 8(a)(1) of the Act. In this regard, an employer violates Section 8(a)(1) of the Act by telling employees their attempts to secure or retain union representation are futile. See, *UNF West, Inc.,* 363 NLRB No. 96 (2016); and *Wellstream Corp.*, 313 NLRB 698, 706 (1994).

While the Section 8(a)(1) violations found here were not alleged in the complaint, it was stated in *Pergament United Sales,* 296 NLRB 333, 334-335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990) that:

> It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.[6] This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses.[7] We find that the 8(a)(4) finding here meets the requirements of the rule.

Here, Michael Bittner was called as a witness by Respondent to establish that it had a good faith doubt of the Union's majority status at the time Respondent withdrew recognition. Thus, Respondent placed the conversations Michael Bittner had with Respondent's officials in play in support of its withdrawal of recognition from the Union therefore they were closely related to the

subject matter of the underlying Section 8(a)(5) and (1) allegation contained the complaint. Those conversations were fully litigated as Respondent placed the bonafides of those conversations at issue as part of the core of its defense, and the finding that those conversations were coercive in nature was the risk Respondent took in raising such a defense.

While Respondent does not raise as a defense that it was privileged to withdraw recognition from the Union based on a stable one employee unit. I would reject that defense even if tendered. In *McDaniel Electric,* 313 NLRB 126 (1993), the Board noted it would require proof that the purportedly single employee unit was a stable one, not merely a temporary occurrence. Here, Respondent employed DeLozier and Michael Bittner as a two person unit from 2012 to April 2015, and at various times in 2012 and 2013 had various other bargaining unit employees on their payroll. While there was no showing that DeLozier was recalled after April 28, 2015, Geesey was hired in September 2015, bringing the unit back to two employees. While Geezey is the son of one of the owners, at the time he was hired Respondent had repudiated the CBA and its bargaining relationship with the Union. Since, I have concluded this was a Section 9(a) relationship, Respondent would have been required under the predecessor CBA to have filled Geesey's position by using the Union hiring hall. Therefore, I do not view Geesey's familial relationship to one of the owners as relevant here because if Respondent had followed the hiring hall provision as it was required to do, it is unlikely that Geesey would have been referred to the slot he occupied at Respondent by the Union.

Respondent contends in its brief through the testimony of Michael Bittner that then Union official Bair stated in 2012 that Respondent could hire whoever it wanted including Michael Bittner. However, for the reasons stated, I did not find Michael Bittner to be the most credible of witnesses. Moreover, multiple employees were hired since Michael Bittner was hired, and there is no claim that those employees were not referred by the Union as required by the CBA's in effect. In fact, Respondent stipulated that is was only since about June 22, 2015, that Respondent repudiated the 2012-2015 CBA and refused to continue in effect its terms and conditions including failing to adhere to hiring and referral procedures, and that it hired Geesey in contravention of those procedures. Thus, I do not find there was a past practice of Respondent hiring outside of requirements of the CBA during the time it recognized the Union, nor do I find Michael Bittner's testimony sufficient to allow Respondent to bypass the hiring provisions of the CBA here.

In *Levitz Furniture Co.,* 333 NLRB 717, 725 (2001), the Board stated, "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule *Celanese* and its progeny insofar as they permit withdrawal on the basis of good-faith doubt. Under our new standard, an employer can defeat a post-withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status." The Board stated, "We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5)."[5]

[5] Both the General Counsel and Respondent contend that I should recommend in different ways to the Board that it revisit its *Levitz* decision. It appears this should be a matter for the

In *Mesker Door, Inc.,* 357 NLRB 591 (2011), it was concluded that an employer may not rely on evidence obtained to withdraw recognition where it has committed unfair labor practices that have a tendency to cause the loss of majority union support. Here the only evidence Respondent tendered to show loss the Union's loss of majority support was the testimony of Michael Bittner. However, I have concluded any statements Michael Bittner made concerning his desire to not be in the Union, and any documents he may have signed to that effect for the reasons set forth above were a direct result and caused by Respondent's unfair labor practices. Therefore, I find Respondent cannot not challenge the Union's majority status by relying on Michael Bittner's remarks and writings, and I find that by withdrawing recognition from the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

I also find that by memo dated April 20, 2015, the Union informed Respondent of a request to bargain for contract negotiations for a meeting set for May 5. By memo dated April 24, Respondent wrote to the Union that "we intend to terminate the Agreement effective June 28, 2015." Michael Bittner's testimony reveals that, around April or May, Respondent's officials stated they were leaving the Union. Given the fact that Respondent did not respond to the offer to negotiate, except to state they were terminating the contract, as well as their well-timed remarks to Michael Bittner, I have concluded it was their intent to signal to the Union by their April 24 letter, that they were not only terminating the existing contract on June 28, but they were severing their collective-bargaining relationship with the Union. Respondent's declining the Union's request to bargain, and the attendant delay it caused could only further undermine the Union in the eyes of employees and presumptively taints any subsequent employee expression of dissatisfaction with the union. See *Lily Transportation Corp,* 363 NLRB No 15, slip op. at 2, fn. 4 (2015), citing *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996), enfd. in relevant part 117 F.3d 1454 (D.C. Cir. 1997). In this regard, Michael Bittner, according to his testimony, did not make up his mind to withdraw from the Union until the end of June. I also find it likely that Respondent's officials broached Michael Bittner about his feelings concerning the Union in response to the Union's request to bargain as the timing of the conversation expressed in Michael Bittner's testimony suggests. Accordingly, I find Respondent's refusal to bargain also tainted any expressions of dissatisfaction by Michael Bittner relied upon by Respondent in its subsequent withdrawal of recognition from the Union.

Additionally, because the Respondent was not entitled to withdraw recognition from the Union, it could not lawfully change its employees' terms and conditions of employment upon the June 28 CBA expiration, without providing the Union notice and bargaining to impasse or agreement. Moreover, the parties stipulated that Respondent ceased honoring its CBA with the Union effective June 22, by disregarding this obligation concerning the CBA prior to its termination date, and by any unilateral changes Respondent made to the employees' wage rates, or other terms and conditions of employment including failing to follow the CBA's hiring hall provisions Respondent further violated Section 8(a)(5) and (1) of the Act. See, *MSR Industry Services, LLC,* 363 NLRB No. 1 (2015). While I have found a Section 9(a) relationship exists with the Union here, the parties stipulated Respondent abrogated the CBA effective June 22, which was prior to its June 28 expiration date. Even if only a Section 8(f) relationship is found, the failure to honor the contract until its expiration date constitutes a violation of Section 8(a)(5) and (1) of the Act.

Board's consideration, and should this decision be appealed the parties are free to directly relate their points of view to the Board.

CONCLUSIONS OF LAW

1. Loshaw Thermal Technology, LLC (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 23 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing since April 23, 2015 to bargain with the Union as the exclusive representative of its employees in the following collective bargaining unit Respondent has violated section 8(a)(5) and (1) of the Act.

> All mechanics and apprentices and any other individuals performing bargaining unit work who are employed by the Employer, or who are members of Local No. 23, with respect to wages, hours and other terms and conditions of employment on any or all work which is within the jurisdiction of Local 23.

4. By refusing since June 22, 2015, to adhere to its collective-bargaining agreement with the Union which expired on June 28 2015, and by making changes to employees' wages, benefits, and other terms and conditions of employment without first notifying and bargaining in good faith with the Union to either agreement or impasse Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By refusing since June 22, 2015 to recognize the Union as the representative of its employees in the collective bargaining unit described above Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By informing an employee that Respondent was leaving the Union, giving him a chance to join Respondent in leaving the Union, providing a deadline for his decision, and then facilitating the paperwork for the employee to withdraw from the Union the Respondent coercively interrogated an employee and informed him his continued membership in the Union would be an act of futility in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. To remedy the Section 8(a)(5) and (1) violations, the Respondent must be ordered to: (1.) comply with the exclusive hiring hall provisions and the terms and conditions of employment in its most recent collective-bargaining agreement with the Union until terms and conditions are changed by a good faith agreement with the Union, or until Respondent has in good faith bargained to an impasse with the Union. Respondent shall offer full and immediate employment to those individuals on the Union's out of work list who on and since June 22, 2015, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions displacing anyone who was hired in their place; (2) for the period beginning June 22, 2015 make whole its bargaining unit employees, as well as those individuals who were denied an opportunity to work for Respondent, for losses suffered as a result of its failure and refusal to pay contractual wage rates and fringe benefits as required in its most recent collective-bargaining agreement with the Union; (3) reimburse these employees and individuals for any expenses ensuing from its failure to make the required contributions to the benefit funds; and (4) to make whole the appropriate fringe benefit trust funds for losses suffered, by making contributions to the funds to the extent that contributions would have been made on behalf of these employees and individuals if it had complied with the requisite collective-bargaining agreement. The amounts are to be computed

as specified, plus interest accrued to the date of payment, as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), minus tax withholdings required by Federal and State laws. Interest shall also be added to the monies owed to the funds using the same formula to calculate interest, but no withholdings are to be deducted. Individuals shall also be compensated for the adverse tax consequences of receiving a lump sum payment of their backpay. See, *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014). Concerning any reports to the Social Security Administration, Respondent within 21 days of the date the amount of backpay is fixed by Board order, shall file a report allocating backpay with the Regional Director, not the Social Security Administration. Once the allocation of back pay is reported to the NLRB, the Regional Director will forward the information to the SSA "at the appropriate time and in the appropriate manner." See, *Advoservice of New Jersey,* 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Loshaw Thermal Technology, LLC its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the Union as the exclusive collective-bargaining representative of all its employees in the bargaining unit described below:

> All mechanics and apprentices and any other individuals performing bargaining unit work who are employed by the Employer, or who are members of Local No. 23, with respect to wages, hours and other terms and conditions of employment on any or all work which is within the jurisdiction of Local 23.

(b) Refusing to bargain with the Union regarding terms of a collective-bargaining agreement to succeed its contract with the Union which expired on June 28, 2015.

(c) Making changes to employees' wages, benefits, and other terms and conditions of employment including hiring hall provisions contained in the parties' most recent collective-bargaining agreement without first notifying and bargaining in good faith with the Union to either agreement or impasse.

(d) Informing employees that Respondent is leaving the Union, giving them a chance to join Respondent in leaving the Union, providing employees with a deadline to decide whether to leave the Union, and then facilitating the paperwork for the employees to withdraw from the Union based on Respondent's deadline.

(e) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the described bargaining appropriate unit concerning terms and conditions of

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Offer full and immediate employment to those individuals on the Union's out of work list who on and since June 22, 2015, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions in the parties' most recent collective-bargaining agreement for all positions currently in existence where employees are performing bargaining unit work replacing any individuals or independent contractor's employees in those positions who were not referred in turn by the referral procedures as provided in the Union's described collective-bargaining agreement.

(c) For the period beginning June 22, 2015 make whole all bargaining unit employees as well as those individuals who were denied an opportunity to work, for losses suffered as a result of its failure and refusal to adhere to the applicable collective-bargaining agreement; reimburse them for any expenses ensuing from its failure to make the required contributions to the benefit funds; and make whole the benefit trust funds for losses suffered in the manner set forth in the remedy section of this decision.

(d) Inform the Union in writing of any changes made to the terms and conditions of employment of bargaining unit employees since on or after June 22, 2015, and/or any changes made to those benefits as set forth in its last contract with the Union, and on request by the Union, rescind any or all changes to those terms and conditions of employment.

(e) Compensate employees entitled to backpay under the terms of this Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(f) Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, to the Board or its agents for examination and copying: all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by Region 5, post at its Spring Grove, Pennsylvania and any other work locations or jobsites copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 20, 2015. Signed copies of said notice shall also be tendered by Respondent to the Union for posting at its hiring hall should it desire to do so.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United Stated Court of Appeals Enforcing and Order of the National Labor Relations Board."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 7, 2016

Eric M. Fine
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize the International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 23 (the Union) as the exclusive collective-bargaining representative of all our employees in the bargaining unit described below:

All mechanics and apprentices and any other individuals performing bargaining unit work who are employed by the Employer, or who are members of Local No. 23, with respect to wages, hours and other terms and conditions of employment on any or all work which is within the jurisdiction of Local 23.

WE WILL NOT refuse to bargain with the Union regarding terms of a collective-bargaining agreement to succeed our contract with the Union which expired on June 28, 2015.

WE WILL NOT make changes to employees' wages, benefits, and other terms and conditions of employment including hiring hall provisions contained in our most recent collective-bargaining agreement with the Union without first notifying and bargaining in good faith with the Union to either agreement or impasse.

WE WILL NOT inform employees that we are leaving the Union, give employees a chance to join us in leaving the Union, provide employees with a deadline to decide whether to leave the Union, and/or facilitate the paperwork for the employees to withdraw from the Union based on our deadline.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the described bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL offer full and immediate employment to those individuals on the Union's out of work list who on or since June 22, 2015, were denied an opportunity to work for us because of our failure and refusal to comply with the hiring hall provisions in our most recent collective-bargaining agreement with the Union for all positions currently in existence where employees are performing bargaining unit work replacing any individuals or independent contractor's employees in those positions who were not referred in turn by the referral procedures as provided in our contract with the Union which expired on June 28, 2015.

WE WILL for the period beginning June 22, 2015 make whole all bargaining unit employees as well as those individuals who were denied an opportunity to work, for losses suffered as a result of our failure and refusal to adhere to the most recent collective-bargaining agreement with the Union; reimburse them for any expenses ensuing from our failure to make the required contributions to the benefit funds; and make whole the benefit funds for losses suffered in the manner set forth in the remedy section of the Board's decision, including compensating affected employees in the manner described in the remedy section for any adverse tax consequences.

WE WILL inform the Union in writing for the period beginning since June 22, 2015 of any changes made to the terms and conditions of employment of bargaining unit employees and on request by the Union, rescind any or all changes to those terms and conditions of employment.

LOSHAW THERMAL TECHNOLOGY, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-2700

(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-158650 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.